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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MICHIGAN, MICHIGAN PUBLIC SERVICE COMMISSION, WILLIAM E. LONG and EDWYNA G. ANDERSON,
Petitioners,

v.

PANHANDLE EASTERN PIPE LINE COMPANY and NATIONAL STEEL CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a Michigan statute regulating local distribution, including the construction of local facilities and the direct delivery of natural gas to the ultimate consumer in Michigan, 1929 P.A. 69, M.C.L. 460.501 *et seq.*, is preempted by the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.*?

LIST OF PARTIES

The parties before the United States Court of Appeals for the Sixth Circuit were:

Appellants

The State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson (Commissioners of the Michigan Public Service Commission).

Michigan Consolidated Gas Company
Michigan Gas Utilities Company

Appellees

Panhandle Eastern Pipe Line Company
National Steel Corporation

Amicus Curiae

Arkansas Public Service Commission
Associated Gas Distributors
Battle Creek Gas Company
Federal Energy Regulatory Commission
Michigan Gas Company
Public Service Commission of Wisconsin
Public Utilities Commission of Ohio
Southeastern Michigan Gas Company
United Distribution Companies

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit") is reported as *Michigan Consolidated Gas Co., et al.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir., 1989), and is reproduced in the Appendix at pages 1a-12a. The Sixth Circuit subsequently denied the joint petition for rehearing of the State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson (collectively, "Michigan"), Michigan Consolidated Gas Company and Michigan Gas Utilities Company in an unreported order dated November 3, 1989. The judgment of the Sixth Circuit was issued as mandate on November 15, 1989. The Order Denying Rehearing and Judgment are reproduced

in the Appendix at pages 13a-15a and 16a-17a. Additionally, on March 30, 1989, in an unreported order, the Sixth Circuit had stayed the appeals pending the decision by the D.C. Circuit in *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir., 1989). That order is reproduced in the Appendix at pages 18a-20a.

The opinion and judgment of the United States District Court for the Western District of Michigan is reported as *National Steel Corp.* v. *Long.*, 689 F.Supp. 729 (W.D. Mich. 1988) and is reproduced in the Appendix at pages 21a-41a.

JURISDICTION

The judgment sought to be reviewed was entered by the Sixth Circuit on October 6, 1989 and its rehearing order was entered on November 3, 1989. Jurisdiction in this Court exists by certiorari pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the Sixth Circuit below existed pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are Section 1(b) and Section 7(c) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717(b), 15 U.S.C. § 717f(c), and Sections 1 and 2 of Michigan Act 69 of the Public Acts of 1929 ("Act 69"), Mich. Comp. Laws 460.501 and 460.502. These provisions are set forth in the Appendix at pages 42a-44a.

STATEMENT OF THE CASE

This case demonstrates the accuracy of the proposition that history repeats itself. Nearly 40 years ago, Panhandle Eastern Pipe Line Company ("Panhandle") sought to construct local facilities to provide natural gas service directly to an industrial consumer in an industrial corridor near Detroit without first obtaining the approval of the Michigan Public Service Commission ("MPSC") pursuant to Act 69, Mich. Comp. Laws

460.501 *et seq.* Act 69, in essence, provides that before a utility may provide service in an area already being served by an existing utility, it must obtain a certificate of public convenience and necessity from the MPSC. Since the area in question was already being served by the Michigan Consolidated Gas Company ("Mich. Con"), the MPSC maintained that Panhandle was required to obtain an Act 69 certificate. The MPSC's position was vindicated by this Court in *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm.* ("*Panhandle/Michigan*"), 341 U.S. 329 (1951), wherein this Court upheld Act 69's requirements.

In this case, Panhandle once again has sought to construct facilities and render natural gas service directly to an industrial consumer in the same industrial corridor near Detroit. The industrial consumer is again in an area already being served by Mich Con and again Panhandle seeks to render such service without obtaining an Act 69 certificate. Despite these similarities, the Sixth Circuit all but ignored *Panhandle/Michigan.*

In 1985, National Steel Corporation ("National"), Mich Con's second largest customer, entered into a contract with a producer to purchase natural gas from certain wells in Oklahoma. Later that same year, Panhandle and National entered into a contract whereby Panhandle agreed to transport the gas to National's steelmaking plant near Detroit. Rather than transporting this gas to Michigan on Panhandle's pipeline and then through Mich Con's existing facilities to National's plant, as in the past, Panhandle agreed to construct new facilities and provide natural gas directly to National.

Panhandle thereafter applied to the Federal Energy Regulatory Commission ("FERC") for a certificate pursuant to Section 7(c) of the NGA, 15 U.S.C. 717f(c), to transport gas from Oklahoma and to construct local fa-

cilities in Michigan to deliver the gas directly to National. Michigan intervened in the proceeding at FERC and affirmatively asserted its Act 69 jurisdiction, arguing that the FERC lacked jurisdiction to authorize the construction of local facilities in Michigan and the direct delivery of gas to National. Nevertheless, on September 10, 1987, the FERC authorized Panhandle to construct facilities and provide direct natural gas service to National. *Panhandle Eastern Pipe Line Co.*, 40 FERC (CCH) ¶ 61,219 (1987), Commissioner Stalon dissenting, 44 FERC ¶ 61,410 (1988).[1]

This case was initiated on September 14, 1987 by the filing of two separate lawsuits. The first was filed by Mich Con in the Wayne Circuit Court in Detroit, Michigan. In its action, Mich Con sought to enjoin Panhandle from directly delivering any natural gas to National because Panhandle had not obtained an Act 69 certificate from the MPSC. Inasmuch as Mich Con's action was based upon a state statute administered by the MPSC, Michigan sought and was granted intervention. Also, on September 14, 1987, Panhandle and National filed a second action, a petition for a declaratory judgment against the Commissioners of the MPSC in the U.S. District Court for the Western District of Michigan. Panhandle and National sought a judgment that the MPSC had no lawful jurisdiction over Panhandle's proposed direct na-

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[1] After FERC denied rehearing on January 26, 1988, *Panhandle Eastern Pipe Line Co.*, 42 FERC (CCH) ¶ 61,076 (1988), Commissioner Stalon dissenting 44 FERC (CCH) ¶ 61,424 (1988), Michigan petitioned the U.S. Court of Appeals for the District of Columbia Circuit for review of the FERC decisions. In an opinion dated August 18, 1989, the U.S. Court of Appeals for the District of Columbia Circuit upheld the FERC orders. *See Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 883 F.2d 117 (D.C. Cir., 1989). Michigan thereafter filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*, both of which were denied in orders dated October 26, 1989. Michigan filed a Petition for Certiorari to the District of Columbia Circuit on January 24, 1990.

tural gas service to National. At no point did Panhandle apply to the MPSC for an Act 69 certificate.

Mich Con's Wayne County Circuit Court complaint was subsequently removed to the U.S. District Court where it was ultimately consolidated with Panhandle and National's lawsuit. The District Court, on November 2, 1987, issued a preliminary injunction enjoining Panhandle from delivering gas to National. However, in its subsequent opinion on the merits, the District Court held that Act 69 was preempted by the NGA, 15 USC §§ 717 *et seq.*, and, therefore, dissolved its earlier injunction and granted a declaratory judgment to Panhandle. *National Steel Corp.* v. *Long*, 689 F.Supp. 729 (W.D. Mich., 1988), Appendix at 21a-39a. Therefore, Michigan appealed that decision to the U.S. Court of Appeals for the Sixth Circuit.

The preemption issue was fully briefed and orally argued before the Sixth Circuit. Thereafter, on March 30, 1988, the Sixth Circuit issued an order deferring its decision on the preemption issues until the issuance by the D.C. Circuit of its decision on the FERC orders granting a certificate to Panhandle to directly serve National. Appendix at 18a-20a.

The arguments in the D.C. Circuit case upon review of the FERC orders did not involve the issues concerning the preemption of Act 69, but rather involved Michigan's argument that FERC's jurisdiction over interstate transportation of natural gas did not extend to the regulation of local distribution (including construction of local facilities and direct deliveries to consumers) in Michigan. The D.C. Circuit expressly notes that its decision relates to the FERC appeal and does not include issues concerning preemption, noting that the preemption issues rested before the Sixth Circuit. The D.C. Circuit stated:

> Transportation in interstate commerce is clearly a subject for federal regulation under 15 U.S.C. § 717 (b). To what extent this works a preemption of state

regulation is not the subject of the present petition for review, and we need not discuss it.[3]

[3] We express no opinion on the finding of preemption in *National Steel Corp.* v. *Long*, 689 F. Supp. 729, a matter which is presumably before the Sixth Circuit.

Michigan Consolidated Gas Co. v. *Federal Energy Regulatory Commission*, 883 F.2d 117, 122 (D.C. Cir. 1989).

The Sixth Circuit, in its subsequent decision in this case, never really reviewed Michigan's arguments that Act 69 was not preempted by the NGA. Instead, the Sixth Circuit merely incorporated the D.C. Circuit's finding that the transportation of gas to National and the construction of local facilities in Michigan was interstate transportation of natural gas over which FERC had jurisdiction. The Sixth Circuit proceeded to find that Act 69 was preempted without any analysis of Michigan's argument that the reservation of state authority over the local distribution of natural gas in Section 1(b) of the NGA, 15 U.S.C. § 717(b), precluded a finding that Act 69 conflicted with federal authority under the NGA.

The Sixth Circuit affirmed the District Court in an opinion dated October 6, 1989. *Michigan Consolidated Gas Co.* v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir., 1989). Appendix at 1a-12a. Michigan, along with the other appellants, jointly sought rehearing which was denied by the Sixth Circuit in an unreported order issued November 3, 1989. Appendix at 13a-15a. The Sixth Circuit issued its mandate on November 15, 1989. Appendix at 16a.

REASONS FOR GRANTING THE WRIT

I. The Power To Regulate Bypass Presents An Important Question Of Federal Law Which Should Be Settled By This Court.

This case involves a jurisdictional dispute concerning federal and state law on the power to regulate the bypass of existing local distribution facilities by an interstate

pipeline company's construction of duplicative local facilities for the direct rendering of natural gas service to consumers in Michigan. Panhandle maintains that the FERC has such power pursuant to its Section 1(b) authority over the transportation of natural gas in interstate commerce. Michigan maintains, however, that Section 1(b) of the Natural Gas Act expressly forbids the FERC from the exercise of such power and instead reserves it to the States. This is a legal question having widespread national implications since the rates and rate designs adopted by state utility commissions for the general ratepaying public will be profoundly affected if FERC is allowed to authorize interstate pipelines to serve large industrial consumers, thereby bypassing state-regulated local distribution utilities. *See generally* Broadman & Kalt, *How Natural is Monopoly? The Case of Bypass in Natural Gas Distribution Markets*, 6 Yale J. on Reg. 181 (1989); MacAvoy, Spulber & Stangle, *Is Competitive Entry Free? Bypass and Partial Deregulation in Natural Gas Markets*, 6 Yale J. on Reg. 209 (1989). Accordingly, Michigan submits that this case is of major significance to national jurisprudence and warrants review by this Court.

II. The Sixth Circuit's Decision Below Violates The Natural Gas Act's Dual Regulatory Scheme And Congressional Intent That The Regulation Of The Local Distribution Of Natural Gas Be Retained By The States And Exempt From Federal Regulation.

The Sixth Circuit's fundamental and critical error is contained in a brief and unembellished passage, in which it concludes that the Panhandle-National bypass involves the interstate transportation of natural gas but does not involve the "local distribution" of natural gas, as defined in Section 1(b) of the NGA, 15 U.S.C. § 717(b):

> However, we agree with the district court, *National Steel Corp.*, 689 F.Supp. at 734-36, and the District of Columbia Circuit, *Michigan Consolidated Gas Co.*,

883 F.2d 117, 121-23, that the Panhandle-National Steel bypass "involves merely interstate transportation of natural gas" (which is subject to FERC jurisdiction) and not local distribution. In this case it is undisputed that the retail sale of natural gas occurs in Oklahoma, where National Steel purchases it for its use at its plant in Detroit. Thus,

> Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Michigan Consolidated Gas Co., 883 F.2d at 121 (Slip op. at 9-10).

Michigan Consolidated Gas Co. v. *Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1300. App. at 9a. The Sixth Circuit's opinion fails, however, to articulate the differences between the interstate transportation of natural gas and the local distribution of such gas. Nor does it explain how Panhandle's role of constructing local facilities in Michigan, to directly serve an end-user in Michigan which is already served by an existing state regulated local distribution utility, does not constitute local distribution.[2] Finally, it fails to indicate whether (and if so, why) a finding of interstate transportation by the court necessarily precludes a finding of "local distribution".[3]

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[2] *Panhandle/Michigan*, 341 U.S. at 333-34, unequivocally determines that tie-in facilities such as those between Panhandle and National are "local facilities". Indeed, the only purpose of such facilities is to accomplish the local, direct delivery of gas to the consumer.

[3] Indeed, both may exist simultaneously since it is clear that if Panhandle were selling gas to National it would be required to obtain both FERC certification to transport the gas interstate *and* MPSC certification to construct facilities and deliver the gas to National. *See, Panhandle/Michigan*, 341 U.S. 329 (1951). Similarly, it is plainly the case that during the time between the Supreme

The Sixth Circuit's decision fundamentally shifts the NGA's division of state and federal authority over natural gas distribution in a manner inconsistent with the NGA's dual regulatory scheme. It ignores Congress' express mandate in Section 1(b) of the NGA that the local distribution of natural gas is to continue being subject to state regulation and exempt from federal regulation. Although Section 1(b) vests FERC with regulatory authority over the transportation of natural gas in interstate commerce, such authority is strictly limited by the proviso in Section 1(b) of the NGA. Section 1(b) expressly provides that FERC's jurisdiction:

> ". . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution . . ."

The Sixth Circuit's interpretation of the NGA also violates this Court's determination that the NGA "[t]ook no authority from state commissions". *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 510 n.15 (1949) The Sixth Circuit's decision diminishes the MPSC's regulatory power, making it less capable of regulation than it would have been before the NGA's enactments in 1938. Prior to 1938, local deliveries to consumers were consistently held to be subject to state regulation.[4] *Missouri* v. *Kansas Gas Co.*, 265 U.S. 298, 307-309 (1924); *Pennsylvania Gas Co.* v. *Public Service Comm.*, 252 U.S. 23, 30-31 (1920); *Public Utilities Comm.* v. *Landon*, 249 U.S. 236, 245-246 (1919).

This Court has recognized that it would be exceedingly incongruous for federal regulators to encroach on pre-

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Court's decision in *FPC* v. *East Ohio Gas Co.*, 338 U.S. 464 (1950) and the Hinshaw Amendment, Pub. L. No. 68-323, 68 Stat. 36, codified as Section 1(c) of the NGA, 15 U.S.C. § 717(c), *both* state *and* federal jurisdiction attached to the transportation facilities of local distribution companies. *See, e.g., Texas Illinois Natural Gas Pipeline Co.*, 10 F.P.C. 235 (1951).

[4] Act 69 was passed in 1929, eight years prior to the NGA.

existing state authority in the guise of exercising NGA powers:

> It would be an exceedingly incongruous result if a statute so motivated, designed and shaped to bring about more effective regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption.

Panhandle Eastern Pipe Line Co. v. *Public Service Comm. of Indiana* ("Panhandle/Indiana"), 332 U.S. 507, 519 (1947). Yet, Congress, intent to preserve state jurisdiction is swept aside by the Sixth Circuit's conclusion that bypass was wholly within FERC's jurisdiction, thereby allowing federal regulation of local distribution, in contravention of Section 1(b) of the NGA and Michigan Act 69.

Finally, it is clear that the Sixth Circuit heavily relied upon the D.C. Circuit's August 18, 1989 decision in *Michigan Consolidated Gas Co.* v. *Federal Energy Regulatory Comm.*, 823 F.2d 117 (D.C. Cir. 1989), from which Michigan also has filed a Petition of Certiorari. The irony of this reliance, however, is that the D.C. Circuit never even discussed the issue of local distribution. The D.C. Circuit's decision prejudices what clearly are substantial local interests by creating an untenable distinction between natural gas service directly to a consumer when accomplished by a pipeline company *sale*, as it was in this Court's 1951 *Panhandle/Michigan* decision [5], and

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[5] In *Panhandle/Michigan*, this Court upheld Michigan's Act 69 certificating requirements, finding that the NGA did not cover direct sales by interstate pipelines. An integral component of this Court's decision was the emphasis placed on local interests, a factor critical to *both* Commerce Clause and NGA analyses:

> Thus, not only would there be two utilities using local facilities to accommodate their distribution systems, but they would be seeking to serve the same industrial consumers. Appellant

direct natural gas service directly to a consumer when accomplished by a pipeline company *transportation.* In terms of local interests, however, this is distinction without a difference since the local interests related to direct service to an end-user and the construction of duplicative local facilities with respect to a "sale" bypass are precisely the same as with respect to a "transportation" bypass. Such a distinction contradicts Congress' goal in the NGA to bring about more effective local regulation. *Panhandle/Indiana,* 332 U.S. at 519. Moreover, the local control of "essentially local interests" which this Court so carefully sought to preserve in its 1951 *Panhandle/Michigan* decision becomes a fiction as a result of the Sixth Circuit's decision below.

III. The Sixth Circuit's Opinion Erroneously Employs A Pre-Emption Analysis That Is Inconsistent With The Anti-Preemption Provision Of Section 1(b) Of The NGA.

The Sixth Circuit's opinion that the NGA preempts the MPSC's regulation over the local distribution involved in

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asserts a right to compete for the cream of the volume business without regard to the local public convenience or necessity. Were appellant successful in this venture, it would no doubt be reflected adversely in Consolidated's overall costs of service and its rates to customers whose only source of supply is Consolidated. This clearly presents a situation of 'essentially local' concern and of vital interest to the State of Michigan.

341 U.S. 333-334. The *Panhandle/Michigan* Court then concluded:

It does not follow that because appellant is engaged in interstate commerce it is free from state regulation or free to manage essentially local aspects of its business as it pleases. The course of this Court's decisions recognizes no such license. [citations omitted]. Such a course would not accomplish the effective dual regulation Congress intended, and would permit appellant to prejudice substantial local interests. This is not compelled by the Natural Gas Act or the Commerce Clause of the Constitution.

Id. at 337.

this case also results from its misapplication of this Court's preemption caselaw. The Sixth Circuit struck down Act 69 as applied, in large part, because of a perceived conflict between MPSC regulation and the NGA's comprehensive regulatory scheme. See Appendix at pages 9a-12a.

This Court, however, has held that the existence of a "comprehensive" federal regulatory scheme, by itself, does not support the view that federal law preempts state law. *New York Dept. of Social Services* v. *Dublino*, 413 U.S. 405, 414-415 (1973); *Pacific Gas & Electric Co.* v. *State Energy Resources Comm.*, 461 U.S. 190, 205 (1983). When conducting a preemption inquiry, the proper focus is on Congress' intent and not the "comprehensive" nature of regulation. *Id.* As a result, if Congress inserts an anti-preemption provision, i.e., a provision preserving state jurisdiction, as it did in Section 1(b) of the NGA, the "comprehensive" nature of federal regulation is considerably less important than where Congress comprehensively regulates an area without expressly limiting federal authority. With respect to the anti-preemption provision at issue in this case, this Court recently noted that "Congress went so far in Section 1(b) of the NGA, 15 U.S.C. § 717(b), as to prescribe not only 'the intended reach of the [federal] power but also [to] specif[y] the areas in which this power was not to extend.'" *See, Northwest Central Pipeline Corp.* v. *State Corp. Comm. of Kansas*, —— U.S. ——, 109 S.Ct. 1262, 1274 (1989).

In cases involving an anti-preemption provision, it is neither necessary nor appropriate to determine whether state law "conflicts" with federal law since Congress has already delineated state and federal jurisdictions through the adoption of an anti-preemption provision. Therefore, the key determinant is the meaning of the anti-preemption provision itself. *See, California Federal Savings & Loan Ass'n* v. *Guerra*, 479 U.S. 272, 282-84 (1987). Moreover, it is clear that neither the Sixth Circuit nor the

D.C. Circuit, upon which the Sixth Circuit relies, provided any reasoned analysis why the direct service by Panhandle to National, and the construction of duplicative local facilities in Michigan, did not constitute "local distribution", which the NGA expressly forbids the federal government from regulating. This failure constitutes a fatal flaw in the Sixth Circuit's preemption analysis.[6]

It was precisely because Congress had explicitly denied the Federal Communications Commission certain subject matter jurisdiction that this Court in *Louisiana Public Service Comm.* v. *Federal Communications Comm.*, 476 U.S. 355 (1976), struck down a federal regulation which crossed-over into an area of regulation which Congress reserved to the States. As this Court stated, "a federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority" because "an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign state, unless and until Congress confers power upon it," and further, that "an agency may not confer upon itself power . . . [t]o permit an agency to expand its power in the face of a congressional

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[6] In the treatise *American Constitutional Law*, Professor Tribe notes:

> The governing federal statute may, however, restrict its own preemptive effect— . . . When this is the case, it seems quite improper for a court even to *ask* whether a challenged state law which clearly purports to require or permit no such thing nonetheless 'conflicts' in some more nebulous sense with the federal statute or its objectives. To engage in such a broader inquiry is to forget that preemption is ultimately a matter of *construing* a federal statute; when the statute contains its own preemption or anti-preemption provision, a court that fails to give that provision dispositive effect and instead applies its own preemption criteria is illegitimately disregarding the source of its authority and, regardless of where its preemption inquiry leads it, is pursuing a fundamentally lawless path.

Tribe, *American Constitutional Law*, Second Edition, page 482, n. 8 (emphasis in original).

limitation on its jurisdiction would be to grant to the agency power to override Congress." *Id.* at 374.

For this reason, the Sixth Circuit's reliance on *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293 (1988), is misplaced. *Schneidewind* involved the question of whether the FERC had the authority to regulate the issuance of securities by interstate pipeline companies. As this Court noted in *Schneidewind*, although the NGA gave the FERC substantial powers, it did not expressly authorize the FERC to regulate the issuance of such securities. Faced with this situation, this Court therefore decided the issue on the basis of an implied preemption. In this case, the Sixth Circuit, citing *Schneidewind*, found that a conflict would exist were the MPSC to deny Panhandle's request for direct service and construction of local facilities for an end-user in Michigan. Appendix at 11a. The difficulty with the Sixth Circuit's finding, however, is that unlike *Schneidewind*, this case involves the operation of an express anti-preemption provision in the NGA, under which "local distribution" is not subject to federal regulation, but remains subject to state authority.

Regardless of whether a conflict preemption analysis is applied, Michigan's Act 69 is valid. As this Court recognized in *Northwest Pipeline*, *supra*, there is a Congressionally designed interplay between state and federal regulation under the NGA. 109 S.Ct. at 1278. This Court held, however, that where a state law impacts on matters within FERC's control, the state's purpose must be to regulate matters which are subjects of state jurisdiction, and the means chosen must be at least plausibly related to matters of legitimate state concern. *Id.*

In this case, Act 69 has a proper state purpose. Act 69 applies to the local distribution of natural gas to the consumer. Indeed, its primary purpose is to ensure that the local public convenience and necessity is considered with respect to the construction of duplicative local facili-

ties and the rendering of direct local service to an end-user in Michigan. Long before this dispute arose, the Michigan Supreme Court held that Act 69's purpose was to prevent the unnecessary multiplication of companies serving the same territory, to avoid wasteful duplication of facilities so as to keep investment at the lowest figure consistent with satisfactory service. *Huron-Portland Cement Co.* v. *Michigan Public Service Comm.*, 351 Mich. 255; 88 N.W.2d 492 (1958). Moreover, Act 69 was enacted in 1929, eight years prior to the NGA. Accordingly, it is manifestly clear that Act 69 was not designed to interfere with policies established in the NGA.

It is also important to remember what Act 69 regulates. It regulates, *inter alia*, the delivery or furnishing of gas to or for the public for compensation, and the construction of local facilities for such purpose. Act 69 is not dependent upon a sale occurring. *See* Mich. Comp. Laws 460.501. Thus, it is aimed at regulating all activities that result in the local distribution of gas to the ultimate consumer.

The Sixth Circuit found a conflict between the NGA and Act 69 saying that Michigan's effort to regulate Panhandle was *simultaneous* with FERC regulation rather than being *sequential*. Appendix at 11a. But this conclusion was based on the incorrect belief that Panhandle's construction of facilities and delivery of gas directly to the consumer, National, did not constitute local distribution. The local construction of facilities and direct delivery of gas to National, however, are severable activities from the interstate transportation of natural gas. To treat them otherwise ignores the express limitation of FERC's powers under Section 1(b) of the NGA.

Northwest Pipeline, *supra*, supports this analysis. In *Northwest Pipeline*, this Court was confronted with a Kansas regulation pertaining to gas production. Since the regulation was aimed primarily at producers and

since Section 1(b) excluded the production and gathering of natural gas from FERC jurisdiction, the Kansas regulation was held not to be preempted by the NGA. 109 S.Ct. at 1276-79. If, however, a single company performed both as a producer of gas in Kansas and as an interstate pipeline transporting that gas in interstate commerce, would the nature of that company's entire activities make its production activities any less subject to Kansas' regulation with respect to local production? Michigan thinks not. Similarly in this case, Panhandle's identity as an interstate pipeline company should not cloud this Court's view of what Panhandle is actually doing when it constructs local facilities in Michigan to provide natural gas directly to a consumer, thereby bypassing and duplicating existing local facilities and services. Simply stated, Panhandle has become a local distribution utility and should be subject to Act 69 state regulation just as all other local utilities are. To permit any other result would be to unravel the preservation of state jurisdiction which the 75th Congress carefully wove into the NGA.

Finally, there factually can be no conflict between Michigan's Act 69 regulation of local distribution and FERC's power to regulate interstate transportation. This is because National, prior to and during this case, was fully able to transport gas from the producers to its plant over existing interstate pipeline and local distribution facilities, including Panhandle's facilities which were already interconnected with the local utility, Mich Con, which in turn interconnected with National.[7] The rates

[7] It should be noted that, historically, pipeline companies such as Panhandle would purchase gas at the "wellhead" from numerous producers and then transport the commingled gas and then resell it at wholesale to local distribution companies such as Mich Con, which would in turn sell and deliver the gas to the ultimate consumer. This was the structure in place in 1950 when *Panhandle/Michigan* was decided. Beginning with the decline in oil prices relative to gas prices in the early 1980's, significant changes began

for such transportation services are duly set by contested case procedures at FERC, with respect to the Panhandle portion of the transportation, and by the MPSC relative to the intrastate utility portion of the transportation service. Michigan's Act 69 (as affirmed by this Court in the 1951 *Panhandle/Michigan* in similar circumstances) would have provided the MPSC the opportunity to determine whether the construction of the duplicative local facilities and the provision of direct services by Panhandle to National was consistent with the local public convenience and necessity. As applied to this transaction, the Sixth Circuit's decision below obliterates state jurisdiction over local distribution and the construction of local facilities for that purpose, in contravention of both Michigan's Act 69 and Congress' express preservation of such state authority in Section 1(b) of the NGA.

PRAYER FOR RELIEF

WHEREFORE, this Court should grant certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and should hold that Michigan's Act 69 is not preempted by the Federal Natural Gas Act.

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to occur at the federal level in the gas industry. One aspect of this change has been the "unbundling" or separation of the pipeline company's merchant function (that of being a seller of natural gas) from its transmission function (that of being a transporter of natural gas). The same unbundling of service is available in Michigan on the local utilities system, at sales or transportation rates set by the MPSC. Thus, with unbundling, large volume consumers may arrange to purchase gas directly from the producers and have it transported by a pipeline company and the local utility. In such circumstances, the pipeline company and utility never own the gas which they are transporting, and the rates for such transportation service are set by the FERC relative to the interstate pipeline portion of the service and by the MPSC relative to the intrastate utility portion of the service.

Respectfully submitted,

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Dated: January 24, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 88-1650, 88-1680, 88-1774, 88-1858

MICHIGAN CONSOLIDATED GAS COMPANY, *et al.*
Plaintiffs-Appellants,
(88-1650, 88-1680 & 88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendants-Appellees.

NATIONAL STEEL CORPORATION AND PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs-Appellees,
(88-1774),

v.

WILLIAM E. LONG AND EDWYNA G. ANDERSON,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Michigan

Decided and Filed October 6, 1989

Before: MERRITT, Chief Judge, MILBURN, Circuit Judge, and LIVELY, Senior Circuit Judge.

MILBURN, Circuit Judge. In these consolidated actions, appellants Michigan Consolidated Gas Company ("MichCon"); Michigan Gas Utilities Company ("MGU"); the State of Michigan; the Michigan Public Service Commission ("MPSC"); and William E. Long and Edwyna G. Anderson appeal the summary judgment granted against them by the district court on the ground that Michigan's authority to regulate the interstate transportation of natural gas in this "bypass" of a local distribution company is preempted by federal law. For the reasons that follow, we affirm.

I.

A.

Appellants MichCon and MGU are Michigan corporations that provide natural gas and related services, such as storage and transportation, in Michigan. Appellant MPSC is the state agency that regulates public utilities in Michigan, and appellants William E. Long and Edwyna G. Anderson were Commission members when these consolidated actions were filed in the district court.

Appellee Panhandle Eastern Pipe Line Company is an interstate pipeline company. Like MichCon and MGU, it is a "natural gas company" within the meaning of the Natural Gas Act of 1938, 15 U.S.C. § 717a(6) ("the Act"). Panhandle therefore falls within the regulatory reach of the Federal Energy Regulatory Commission ("FERC") as well as, under certain circumstances, the MPSC.

Panhandle has supplied MichCon and other Michigan utilities with natural gas for more than fifty years. The Panhandle pipeline involved in this case runs from the State of Texas through Michigan and happens to cross through the industrial area of the City of Detroit, where

appellee National Steel Corporation's ("National Steel") Great Lakes Steel Division plant is located. National Steel is an integrated steelmaker and was MichCon's second largest customer until July 1988, when it tapped directly into the Panhandle pipeline.

This case involves the "bypass" or direct transportation of natural gas from the wellhead in the State of Oklahoma to the ultimate consumer in Michigan. For many years, pipeline companies purchased natural gas at the wellhead from natural gas producers, transported it through pipelines, and then resold it at wholesale to local distribution companies ("LDCs"), such as MichCon and MGU. Producers sold natural gas in the interstate market under federal certificates at federally regulated prices. Interstate pipelines bought, transported, and sold natural gas under federal certificates at federally regulated prices. The LDCs resold natural gas at retail to ultimate consumers (sales to the "burner tip") under state certificates at state regulated prices. *See Associated Gas Distrib. v. FERC*, 824 F.2d 981, 993-97 (D.C. Cir. 1987), *cert. denied*, —— U.S. ——, 108 S. Ct. 1468 (1988); *Public Serv. Comm'n v. FERC*, 610 F.2d 439, 441 (6th Cir. 1979).

In 1978, Congress adopted the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, which reduced the FERC's discretion in controlling natural gas prices at the wellhead, eliminated many licensing requirements, and facilitated competition in interstate and intrastate markets. Then, in the early 1980s, supplies of oil and natural gas surged and prices dropped. These developments prompted fundamental changes in the natural gas industry. Of particular relevance to this case was the "unbundling" of the pipelines' functions as wholesalers and transporters of natural gas.

Today, instead of buying from pipeline companies, LDCs and large consumers often buy natural gas at the

wellhead directly from producers and then hire pipeline companies to transport it to LDCs, which distribute the natural gas to the burner tips. National Steel, for example, began purchasing natural gas directly from wellhead sources in Oklahoma and Louisiana in 1986, and hired pipelines to transport the natural gas to Michigan. The pipelines then delivered National Steel's natural gas to MichCon. Panhandle, for example, charged approximately 41 cents per 1,000 cubic feet of natural gas for transportation *over many hundreds of miles.* MichCon then transported the natural gas about five miles to the Great Lakes Steel Division, a service for which it charged approximately 80 cents per 1,000 cubic feet.

In September 1985, Panhandle agreed to add fittings and pipes to permit National Steel to tap its pipeline at the Great Lakes Steel Division. The agreement provided that National Steel would purchase natural gas in Oklahoma and hire Panhandle to transport the natural gas directly to its steel mill in Detroit, bypassing the MichCon local network and the higher transportation rates authorized by the MPSC for natural gas transported on MichCon's system. National Steel claims that the bypass will save it approximately $10 million annually in energy costs and that such savings are necessary if it is to remain competitive with foreign steelmakers. It further claims that if this bypass is disallowed, it will turn to another energy source rather than resume purchasing natural gas from MichCon.

MichCon and the other appellants counter that if this bypass stands, it will have a devastating impact on the State of Michigan's utility structure and, ultimately, its economy. They depict Panhandle's agreement as "market raiding" and "cream skimming," and warn that it sets the precedent for sweetheart deals with Michigan's other large natural gas consumers, which will result in massive cost shifting that will leave small businesses and individual consumers as the sole support for the state's utilities network.

B.

On December 12, 1985, Panhandle applied to the FERC for a certificate of public convenience and necessity under section 7(c) of the Act, 15 U.S.C. § 717f(c), authorizing the bypass and construction of the facilities necessary to connect it. On January 27, 1987, after conducting hearings on the matter, an FERC Administrative Law Judge recommended approving Panhandle's application. MichCon and the MPSC filed exceptions, but in a decision issued September 10, 1987, the FERC adopted the ALJ's recommendation and authorized the bypass and all necessary construction. MichCon and the MPSC petitioned for judicial review of FERC's decision, arguing that it had exceeded its jurisdiction and incorrectly construed section 7(c). On August 18, 1989, the United States Court of Appeals for the District of Columbia Circuit denied the petition for review and upheld the FERC's authorization of the bypass, holding that the bypass "involves merely interstate transportation of natural gas," and not local distribution. *Michigan Consol. Gas Co. v. FERC*, No. 88-1062 and consolidated cases (D.C. Cir. August 18, 1989).

Meanwhile, on July 30, 1987, while Panhandle's application was still pending before the FERC, MichCon filed a formal complaint against the pipeline company with the MPSC. On September 14, 1987, four days after the FERC authorized the bypass, Panhandle and National Steel filed an action in the United States District Court for the Western District of Michigan, arguing that by entertaining MichCon's complaint, the MPSC was interfering with the exclusive jurisdiction of FERC over the interstate transportation of gas. Panhandle and National Steel sought declaratory relief and an injunction prohibiting the alleged interference.

MichCon responded by filing an action in the Wayne County, Michigan, Circuit Court the next day. MichCon sought injunctive relief in its state action, claiming that

Panhandle's FERC certificate was insufficient authority for the bypass and that Panhandle would violate Michigan law by delivering gas to National Steel without MPSC approval. The State of Michigan, the MPSC, and MGU intervened as plaintiffs, and National Steel intervened as a defendant. Panhandle then removed MichCon's state case to the district court, where it was consolidated with Panhandle's pending action.

On September 29, 1987, the MPSC issued an order that prohibited Panhandle from constructing the bypass connections and delivering gas to National Steel until it found the proposed service to be in the public interest. The MPSC then scheduled hearings on the matter.

On November 2, 1987, the district court issued a preliminary injunction enjoining Panhandle from delivering gas to National Steel, but it did not enjoin the construction of the bypass connections. The district court then tried the consolidated cases on stipulated evidence, briefs, and oral argument. In its decision issued June 16, 1988, and reported at *National Steel Corp. v. Long*, 689 F. Supp. 729 (W.D. Mich. 1988), the district court found the bypass did not constitute "local distribution" as defined by the Act, dissolved the injunction, and held that the Act preempted application of Michigan law to the FERC-certificated bypass. MichCon, MGU, the State of Michigan, the MPSC, William Long and Edwyna Anderson filed timely notices of appeal to this court in late June and early July 1988. As Panhandle had completed its construction work during the course of litigation in the district court, it connected the bypass and began delivering gas to National Steel on July 1, 1988.

The primary issues raised in these consolidated appeals are: (1) whether the Panhandle-National Steel bypass constitutes "local distribution" of gas within the meaning of the Act; and (2) whether the MPSC can exercise jurisdiction over the bypass.

II.

A.

These consolidated appeals present a case of first impression in this circuit; *viz.*, the application of the Natural Gas Act ("the Act") to bypass transportation of natural gas in interstate commerce and the issue of federal preemption by the Act of state regulation in such a situation—questions of law which are subject to *de novo* review upon appeal. *See Pullman-Standard v. Swint*, 456 U.S. 273, 287-88 (1982). It is uncontested that the Act applies in this case, as "[g]as crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755 (1981). However, in resolving the issues in this case, a review of the language and policies of the Act is appropriate.

By 1938, in a series of Commerce Clause cases, the Supreme Court established that states could regulate the intrastate and interstate transportation and sale of natural gas to ultimate consumers, but they could not reach indirect sales for resale, such as a pipeline's sale to an LDC for resale. *See Schneidewind v. ANR Pipe Line Co.*, 108 S. Ct. 1145, 1151 (1988); *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Indiana* ("*Panhandle/Indiana*"), 332 U.S. 507, 514-15 (1947). The states' inability to regulate wholesale natural gas transactions handicapped their ability to regulate the natural gas industry and left consumers at the mercy of producers and pipeline companies. *See Panhandle/Indiana*, 332 U.S. at 515-16. Congress responded with the Act, "a comprehensive scheme of federal regulation of 'all wholesales of gas in interstate commerce. . . .'" *Northern Nat. Gas Co. v. State Corp. Comm'n*, 371 U.S. 84, 91 (1963) (quoting *Phillips Pet. Co. v. Wisconsin*, 347 U.S. 672, 682 (1954)).

Through the Act, Congress delegated to the Federal Power Commission (now the FERC) "exclusive jurisdic-

tion over the transportation and sale of gas in interstate commerce for resale." *Schneidewind*, 108 S.Ct. at 1151. The Act was drawn very meticulously and has been interpreted narrowly to affect only those areas that were outside of the states' regulatory reach at the time it was passed. *See id.* at 1153; *Panhandle/Indiana*, 332 U.S. at 516-17; *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944). The three things Congress specifically intended to draw within its regulatory power in the Act were (1) the interstate transportation of natural gas; (2) wholesale natural gas transactions in interstate commerce; and (3) natural gas companies engaged in interstate transportation or wholesale sales *Panhandle/Indiana*, 332 U.S. at 516. The result is that "[t]he natural gas industry is subject to interlocking regulation by both federal and state authorities." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1271 (1989).

B.

The Act specifically excludes "the local distribution of natural gas" from FERC jurisdiction.[1] In this case, the appellants argue that the FERC did not have jurisdiction over the Panhandle-National Steel bypass because it amounted to the "local distribution of natural gas," which is not permitted in Michigan without MPSC approval.

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[1] The pertinent section of the Act relevant to this appeal is section 1(b) of the Act, 15 U.S.C. § 717(b), which provides:

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or *to the local distribution of natural gas* or to the facilities used for such distribution or to the production or gathering of natural gas. (Emphasis supplied).

See M.C.L.A. §§ 460.501.506. However, we agree with the district court, *National Steel Corp.*, 689 F. Supp. at 734-36, and the District of Columbia Circuit, *Michigan Consol. Gas Co.*, —— F.2d —— (slip op. at 9-11), that the Panhandle-National Steel bypass "involves merely interstate transportation of natural gas" (which is subject to FERC jurisdiction) and not local distribution. In this case it is undisputed that the retail sale of natural gas occurs in Oklahoma, where National Steel purchases it for its use at its plant in Detroit. Thus,

> Panhandle's role under the arrangement is simply to transport National's gas from one state to another across several intervening states. It is hardly conceivable that a transaction could fit more neatly into the category of "transportation of natural gas in interstate commerce."

Michigan Consol. Gas Co., —— F.2d —— (slip op. at 9-10).

In agreeing with his conclusion, we decline the appellants' implied invitation to enlarge the exceptions for state jurisdiction in section 1(b) of the Act to include their "functional equivalents." Given the careful and continuing attention that Congress has focused on the natural gas industry, we are of the view that if Congress had intended to except the "functional equivalent" of "local distribution" from federal jurisdiction, it would have stated so by now.[2]

C.

Having rejected the appellants' contention that this case falls within the "local distribution exception" to the Act, and having determined that the bypass lies within

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[2] We also note, as did the Court of Appeals in the District of Columbia, that we decide this matter without considering the level of deference that is due to an agency's determination that it has jurisdiction under the statute it enforces. *See Michigan Consol. Gas Co.*, —— F.2d —— (slip op. at 11 n.3).

FERC's jurisdiction, it remains for us to determine whether the state's ability to regulate the bypass has been preempted. Congressional power to preempt state law originates in the Supremacy Clause of Article VI of The Constitution of the United States. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986). Preemption may be express or implied, but in either case, the question is one of congressional intent. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, ——, 107 S. Ct. 683, 689 (1987). As the Act does not expressly mention preemption of state law in the case of bypass transportation, we turn to the question of implied preemption:

> In the absence of explicit statutory language, however, Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred [1] where the pervasiveness of the federal regulation precludes supplementation by the States, [2] where the federal interest in the field is sufficiently dominant, or [3] where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." [citations omitted] Finally, even where Congress has not entirely displaced state regulation in a particular field, [4] state law is preempted when it actually conflicts with federal law. Such a conflict will be found "'when it is impossible to comply with both state and federal law, [citations omitted], or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.'"

Schneidewind, supra, 108 S. Ct. at 1150-51.

Where a preemption question involves the Act, we bear in mind that with "unusual legislative precision," *Panhandle/Indiana*, 332 U.S. at 517, Congress extended

federal jurisdiction only to "the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind*, 108 S. Ct. at 1153. We also are mindful that "every state statute that has some indirect effect on rates and facilities of natural gas companies is not pre-empted." *Id.* at 1155.

We recognize that the Act contains a meticulously drawn statement of federal jurisdiction with the intent of creating when the Act was enacted. Thus, we believe that in establishing a comprehensive regulatory network, Congress intended to occupy a field which the states could not reach. Similarly, to allow the MPSC to regulate the bypass in this case would obstruct the execution of the *complementary* relationship between state and federal regulation established by the Act. Were we to permit the MPSC to cancel the FERC's approval of the Panhandle-National Steel bypass, we would subordinate federal regulatory power to state regulatory power in the complete absence of authority to do so.

The appellants further argue that the Act provides for several areas in which state and federal regulatory commissions have dual jurisdiction. However, the cases and situations they cite involve *sequential* jurisdiction, such as federal jurisdiction over the interstate transportation of gas from the well-head to the LDC, and state regulation from the LDC to the burner tip. In this case, where Panhandle is not engaged in local distribution, but in the direct interstate transportation and delivery of natural gas, the dual jurisdiction MichCon and the other appellants seek is not sequential but simultaneous. Moreover, we find nothing in the Act nor in relevant case law that contemplates or supports the notion of simultaneous state and federal regulations of the interstate transportation of natural gas. Therefore, as the Supreme Court held that there was no room within the federal domain to allow the MPSC to regulate the issuance of long-term securities by gas companies in *Schneidewind*,

we are of the view that the MPSC may not regulate Panhandle's interstate transportation of natural gas.

III.

For the foregoing reasons, we conclude that the Panhandle-National Steel bypass involves only the interstate transportation of natural gas, and that the Act preempts MPSC regulation over the bypass. Therefore, the summary judgment of the district court is AFFIRMED.[3]

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[3] There is no claim here that the court should abstain from deciding this case under the principles articulated in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Younger v. Harris*, 410 U.S. 37 (1971); *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 109 S. Ct. 2506 (1989), and *CSXT, Inc. v. Pitz*, Nos. 88-1629/1642, August 22, 1989. Therefore, the court has no occasion to address the issue of abstention by a federal court in favor of state administrative proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 88-1650/1680/1774/1858

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff-Appellant (88-1650)
Plaintiff (88-1680)

STATE OF MICHIGAN, *et al.*,
Intervening Plaintiffs

MICHIGAN GAS UTILITIES COMPANY,
Intervenor-Appellant (88-1680)

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant-Appellee

NATIONAL STEEL CORPORATION,
Intervening Defendant-Appellee

NATIONAL STEEL CORPORATION, *et al.*,
Plaintiffs-Appellees (88-1774)
Plaintiffs (88-1858)

vs.

WILLIAM E. LONG, *et al.*,
Defendants-Appellants (88-1774)
Defendants (88-1858)

MICHIGAN GAS UTILITIES COMPANY,
Intervening Defendant

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff

STATE OF MICHIGAN, *et al.*,
Intervening Plaintiffs (88-1774)
Intervening Plaintiff-Appellants
(88-1858)

MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiff

vs.

PANHANDLE EASTERN PIPE LINE COMPANY,
Defendant (88-1774)
Defendant-Appellee (88-1858)

NATIONAL STEEL CORPORATION,
Intervening Defendant (88-1774)
Intervening Defendant-Appellee
(88-1858)

Before: MERRITT, Chief Judge and MILBURN, Circuit Judge; LIVELY, Senior Circuit Judge

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ORDER

[Filed Nov. 3, 1989]

This matter is before the court upon consideration of the petition for rehearing by appellants Michigan Consolidated Gas Company, Michigan Gas Utilities Company, State of Michigan, Michigan Public Service Commission, William E. Long and Edwyna G. Anderson of this court's October 6, 1989 opinion affirming the decision of the district court.

Having carefully examined the petition and the record, this court finds it misapprehended no question of law or fact in its October 6, 1989 order.

It is therefore ORDERED that the petition for rehearing be, and it hereby is, denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 88-1650/1680
88-1774/1858

MICHIGAN CONSOLIDATED GAS COMPANY,
Plaintiff-Appellant
(88-1650),

MICHIGAN GAS UTILITIES COMPANY,
Intervenor-Appellant
(88-1680),

STATE OF MICHIGAN; MICHIGAN PUBLIC SERVICE COMMISSION,
Intervening Plaintiff-Appellant
(88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation,
Defendant-Appellee
(88-1650/1680/1858),

NATIONAL STEEL CORPORATION,
Intervening Defendant-Appellee,
(88-1650/1680/1858),
Plaintiff-Appellee
(88-1774),

WILLIAM E. LONG; EDWYNA G. ANDERSON,
Defendants-Appellants
(88-1774).

Before: MERRITT, Chief Judge; MILBURN, Circuit Judge; and LIVELY, Senior Circuit Judge.

JUDGMENT

[Filed Oct. 6, 1989]

ON APPEAL from the United States District Court for the Western District of Michigan.

THIS CAUSE came on to be heard on the records from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said district court in this case be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Issued as Mandate: November 15, 1989

Costs: None

No. 88-1650
No. 88-1680
No. 88-1774
No. 88-1858

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHIGAN CONSOLIDATED GAS COMPANY, *et al.*,
Plaintiffs-Appellants,
(88-1650, 88-1680 &
88-1858),

v.

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Defendants-Appellees.

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs-Appellees,
(88-1774),

v.

WILLIAM E. LONG and EDWYNA G. ANDERSON,
Defendants-Appellants.

ORDER

Before: MERRITT and MILBURN; Circuit Judges; and LIVELY, Senior Circuit Judge.

Appellants Michigan Consolidated Gas Co. ("Mich-Con"), the Michigan Gas Utilities Co. ("MGU"), the State of Michigan, the Michigan Public Service Commis-

sion ("MPSC"), and Commission members William E. Long and Edwyna G. Anderson appeal the summary judgments granted against them on the ground that Michigan's authority to regulate the interstate transportation of natural gas is preempted by federal law.

These consolidated appeals arise from a "bypass" transaction in which National Steel Corporation ("National") has agreed to purchase gas in Oklahoma and have it transported directly to its Great Lakes Steel Division through Panhandle Eastern Pipe Line Company's ("Panhandle") pipelines. This direct delivery, connected July 1988, enables National to bypass the local gas distributing company, MichCon.

On December 12, 1985, Panhandle applied for a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("FERC") authorizing the bypass transportation and construction of the facilities necessary to connect the bypass. On January 27, 1987, after full hearings on the matter, a FERC Administrative Law Judge issued an initial decision recommending approval of Panhandle's application. MichCon and the MPSC filed exceptions to that recommendation with the FERC. On September 10, 1987, the FERC issued the certificate authorizing the bypass and all necessary construction. MichCon, the MPSC, and the State of Michigan filed for a rehearing. FERC held that Panhandle's "bypass" involved only interstate transportation and no "local distribution" of gas. MichCon and the MPSC have appealed these FERC orders to the United States Court of Appeals for the District of Columbia Circuit, No. 88-1062, and consolidated cases.

The parties to this appeal have raised the following issues: (1) whether the direct delivery of gas to an industrial consumer, bypassing the established utility, constitutes "local distribution" of gas within the meaning of the Natural Gas Act (15 U.S.C. section 717 *et seq.*); (2) whether the MPSC can exercise concurrent jurisdic-

tion over the bypass delivery of gas; and (3) whether the MPSC's exercise of jurisdiction over the bypass constitutes an impermissible burden on interstate commerce.

However, at the conclusion of oral argument and before these consolidated cases were taken under submission, the panel directed the parties to file supplemental briefs within thirty days on the relationship between these consolidated appeals and the appeals in the District of Columbia Circuit involving the same parties. The supplemental briefs have now been filed.

It appearing to the court after further consideration of this matter that while residual issues may exist following a decision by the United States Court of Appeals for the District of Columbia Circuit in *Michigan Consolidated Gas Co. v. FERC*, No. 88-1062, and consolidated cases, a controlling issue in these cases may be decided by the District of Columbia Circuit; *viz.*, whether or not Panhandle's "bypass" involves only interstate transportation and no "local distribution" of gas.

Accordingly, it is ORDERED that the appeals herein be and they hereby are stayed pending the decision of the United States Court of Appeals for the District of Columbia Circuit in *Michigan Consolidated Gas Co. v. FERC*, No. 88-1062, and consolidated cases.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L87-30 CA5

HON. ROBERT HOLMES BELL

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs,

-vs-

WILLIAM E. LONG and
EDWYNA G. ANDERSON,
Defendants.

File No. L87-46 CA5

HON. ROBERT HOLMES BELL

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan Corporation,
Plaintiff,

and

STATE OF MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION, and
MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiffs,

-vs-

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware Corporation,
Defendant,

and

NATIONAL STEEL CORPORATION,
Intervening Defendant.

OPINION OF THE COURT

These two consolidated actions present issues regarding the interplay of the regulatory authority of the Federal Energy Regulatory Commission and the Michigan Public Service Commission over the interstate transportation and delivery of natural gas. Now before the Court are cross-motions for summary judgment, supported by extensive stipulation of fact. In essence, the motions require the Court to determine whether in this case, the asserted regulatory authority of the Michigan Public Service Commission is precluded by federal law.

FACTUAL BACKGROUND

The proposed activity which gives rise to this dispute is rather straightforward. National Steel Corporation (National Steel) has arranged for the purchase of natural gas from Union Texas Products Corporation in Oklahoma at facilities that are connected with the interstate transportation system of Panhandle Eastern Pipe Line Company (Panhandle). Panhandle has agreed to transport the gas exclusively through its own lines directly to National Steel's Great Lakes Steel Division in Ecorse and River Rouge, Michigan. This direct delivery will enable National Steel to "bypass" the local distributing company, Michigan Consolidated Gas Company (Michigan Consolidated), which currently transports gas to the Great Lakes plant, purporting to substantial cost-savings.

In order to perform this bypass transportation service, Panhandle applied to the Federal Energy Regulatory Commission (Commission) under § 7(c) of the Natural Gas Act. 15 U.S.C. § 717f(c), for a certificate of public convenience and necessity, authorizing the proposed transportation and requisite extension of facilities. The certificate was granted on September 10, 1987. This certificate notwithstanding, the Michigan Public Service

Commission (MPSC) asserts under Act 69 of Michigan Public Acts of 1929, M.C.L. § 460.501 *et seq.*; M.S.A. § 22.141 *et seq.*, that the proposed transportation may not proceed until after it has issued its own certificate of public convenience and necessity.[1] Accordingly, the MPSC sought and obtained from this Court a preliminary injunction restraining such transportation pending the Court's final determination whether the MPSC does in fact have jurisdiction to regulate the delivery of natural gas to National Steel. It is to this question which the Court now turns.

NATURAL GAS ACT

The proposed transportation of natural gas is transportation in interstate commerce. "Gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey." *Maryland v. Louisiana*, 451 U.S. 725, 755, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). The authority of the individual states to regulate such transportation is fundamentally restricted by the Commerce Clause, U.S. Const. Art. 1, § 8, which empowers Congress to regulate commerce among the several states. In 1938, Congress delegated its authority to regulate interstate transportation of natural gas to the Federal Power Commission by

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[1] Section 2 of 1929 P.A. 69 provides:

> No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local business and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension.

M.C.L. § 460.502, M.S.A. § 22.142.

enacting the Natural Gas Act ("Act"), 15 U.S.C. § 717 *et seq.* The Act provides at § 1(b):

> The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b). The Act thus conferred upon the Federal Power Commission, predecessor of the Federal Energy Regulatory Commission, power to regulate three things, which the states had been deemed, by virtue of the Commerce Clause, unable to regulate: (1) transportation of natural gas in interstate commerce; (2) sale of natural gas in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana,* (*Panhandle/Indiana*) 332 U.S. 507, 516, 68 S.Ct. 190, 92 L.Ed. 128 (1947).

The Act was designed not to encroach upon the states' regulatory authority, but to complement it, establishing a means whereby those aspects of natural gas commerce which had traditionally been deemed beyond the reach of state control, could be federally regulated. *Id.*, 332 U.S. at 517. The Act thus created a "comprehensive and effective regulatory scheme" • • • • "of co-operative action between federal and state agencies." *Id.*, 332 U.S. at 520. The pre-existing regulatory power of the states was left intact, undiluted by the Act. Id., 332 U.S. at 518.

Prior to the Act, the parameter of state authority had been determined through case-by-case interest balancing

analysis under the Commerce Clause. *Federal Power Commission v. Southern California Edison Co.*, 376 U.S. 205, 213-216, 84 S.Ct. 644, 11 L.Ed.2d 638 (1964). In the Act, Congress obviated the need for such case-by-case analysis, drawing "a bright line easily ascertained, between state and federal jurisdiction." *Id.*, 376 U.S. at 215-216. While confirming that interstate *transportation* of natural gas is federally regulable, the Act draws a "clear and complete" line between sales for resale, which are subject to federal jurisdiction, and direct sales for consumptive uses, subject to state jurisdiction. *Id.*, 376 U.S. at 214-215. In addition, the Act expressly recognizes that "local distribution" and the facilities used therefor are exempt from federal jurisdiction.

Thus, application of the Act's bright line test to determine the bounds of federal and state jurisdiction in this case requires consideration of three elements: (1) the scope of the Commission's jurisdiction over interstate transportation (2) whether the proposed transaction includes a direct retail sale; and (3) whether the proposed transaction includes local distribution.

APPLICATION OF THE BRIGHT LINE

(1) *Interstate Transportation.* Panhandle's proposed transportation of natural gas from Oklahoma to Michigan is interstate transportation subject to regulation by the Commission. The Commission's jurisdiction over transportation applies regardless of whether the gas transported is ultimately sold retail or wholesale. *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 636, 92 S.Ct. 1827, 32 L.Ed2d 369 (1972). Moreover, the Commission's transportation jurisdiction extends to the point of delivery and covers the facilities through which the gas is delivered. *Panhandle/Indiana, supra; Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464, 70 S.Ct. 266, 94 L.Ed. 268 (1950); *International Paper Co. v. Federal Power Commission*, 438

F.2d 1349 (2d Cir. 1971); *United Gas Pipe Line Co. v. Federal Power Commission*, 385 U.S. 83, 87 S.Ct. 265, 17 L.Ed.2d 181 (1986). Hence, that the Commission had authority to pass on and grant Panhandle's application for a certificate of public convenience and necessity is not seriously contested. It remains to be determined whether the MPSC *also* has jurisdiction over some aspect of the proposed transaction.

(2) *Direct Retail Sale.* Notwithstanding the Commission's transportation jurisdiction, the Act reserves for the states authority to regulate the actual sales of natural gas directly to consumers. Here, the proposed transaction clearly involves direct retail sale of natural gas to National Steel for its own consumption. It is just as clear, however, that the sale takes place not in Michigan, but in Oklahoma. There is no transfer of title in Michigan, but simply the delivery by Panhandle of natural gas which already belongs to National Steel. The MPSC's authority to regulate retail sales would thus appear to provide no basis for its present assertion of jurisdiction.

The Court is urged, however, to look beyond the form of the proposed transaction. In its effect upon local interests, it is argued, the proposed transaction is identical to those which have been held subject to state regulation in *Panhandle/Indiana*, *supra*, and *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission*, 341 U.S. 329, 71 S.Ct. 777, 95 L.Ed 993 (1951) (*Panhandle/Michigan*). For this reason, the Court is asked to deem the transaction a "de facto sale" in Michigan, which is subject to regulation by the MPSC.

In *Panhandle/Indiana* and *Panhandle/Michigan*, Panhandle sought to transport *and sell* natural gas in interstate commerce directly to industrial end-users. At issue in each case was whether the state in which the gas was received and purchased retained regulator authority over

the transaction even though such regulation would invariably touch upon interstate commerce. In ruling that the states did have power to regulate, the Supreme Court looked to the language of § 1(b) of the Natural Gas Act. Since the subject sales of natural gas were not for resale, but were in the nature of an "other sale" not subject to federal regulation and traditionally regulable by the states; and since the Act was construed as not having usurped or diminished preexisting state regulatory power, the states were deemed to have continuing authority to regulate the *sales*. Thus, the ruling in each case was tied closely to the language of the Act and the "bright line" established by Congress: sales for resale are subject to federal regulation; sales for consumptive use are subject to state regulation.[2] The *Panhandle/Indiana* and *Panhandle/Michigan* decisions do not offer persuasive support for the contention that sufficiently important local interests may justify treatment of a non-sale transaction as a sale so that it fits on one side of the bright line or the other.

In *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 85 S.Ct. 1517, 14 L.Ed.2d 466 (1965), lease-sale transactions were deemed to be "sales" of natural gas for purposes of the Act. The Court determined that paying slavish respect to the form of the transactions, while ignoring their economic realities, would permit avoidance of Federal Power Commission jurisdiction and circumvention of the Act's purposes. The court held the Act "would be hamstrung if it were tied down to technical concepts of local law." *Id.*, 381 U.S. at 400. None of these three concerns is present here. National

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[2] It is true that in both cases, the court buttressed its application of the Act's bright line by discussing the importance of the local interests as justification for finding state authority even if Congress had not so clearly spoken. However, the importance of local interests was not the gravamen of the court's reasoning; the Act's language was.

Steel and Panhandle do not seek to avoid the Commission's jurisdiction, but have submitted thereto and have obtained the requisite certification. Secondly, as is more fully discussed *infra*, the Court does not believe the purposes of the Act are circumvented through this proposed transaction, for the very reason that it is subject to the Commission's regulation. Finally, this case does not present the potential of emasculating the Act through adherence to technical concepts of local law. At issue here, rather, is a contractual bailment arrangement. Cf. *Pennzoil Co. v. Federal Energy Regulatory Commission*, 645 F.2d 360, 386, n.55 (5th Cir. 1981).

Moreover, the "de facto sale" theory was rejected in *Public Service Electric & Gas Co. v. Federal Power Commission*, 371 F.2d 1 (3d Cir. 1967), *cert. denied* 389 U.S. 849, 88 S.Ct. 33, 19 L.Ed.2d 119 (1967), under facts very similar to those here presented. Where a natural gas producer hired the services of an interstate pipeline company to transport the producer's gas across state lines for consumption at another facility of the producer, the fact that the gas was commingled with gas belonging to the pipeline company was held not to compel the conclusion that a succession of sales had taken place where there was no evidence from which to infer that the parties intended anything other than the bailment of a fungible commodity. *Id.*, 371 F.2d at 4. The Court finds this reasoning persuasive and directly applicable in this case.

Accordingly, the Court declines to construe the proposed transaction as including a direct retail sale by Panhandle to National Steel which is subject to MPSC jurisdiction.

(3) *Local Distribution.* It is further contended the Commission's transportation jurisdiction does not limit the MPSC's authority, expressly preserved by § 1(b) of the Act, to regulate local distribution of natural gas and the facilities used therefor. The question posed, then, is

whether any aspect of the proposed transaction constitutes "local distribution." Although the Act does not define "local distribution," valuable insight into congressional intent is found in H.R. Rep. 709, at p.3, 75th Cong., 1st Sess. (1937):

> In view of the importance of section 1(b), which states the scope of the act, it seems advisable to comment on certain provisions appearing therein. It will be noted that this subsection of the bill, after affirmatively stating, the matters to which the act is to apply, contains a provision specifying what the act is not to apply to, as follows:
>
> > "but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."
>
> The quoted words are not actually necessary, as the matters specified therein could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act the committee has included it in this bill. *That part of the negative declaration stating that the act shall not apply to "the local distribution of natural gas" is surplusage by reason of the fact that distribution is made only to consumers in connection with sales, and since no jurisdiction is given to the Commission to regulate sales to consumers the Commission would have no authority over distribution, whether or not local in character.* (Emphasis added.)

House Report No. 709, thus, strongly suggests Congress understood and intended the "local distribution" exemp-

tion to be coextensive with the "other sale" exemption. That is, neither exemption was deemed to diminish the Commission's authority, because the Commission had, in the first instance, been affirmatively granted jurisdiction only over interstate transportation and sales for resale. In other words, Congress understood "local distribution" as necessarily entailing direct retail sales for consumptive use. According to this construction, unless a transaction includes a direct retail sale, it does not constitute local distribution. Since, as discussed *supra*, Panhandle's proposed transportation of natural gas to National Steel is, to the point of delivery, interstate transportation,[3] and does not include a direct retail sale in Michigan, it is not exempt from the Commission's jurisdiction under the Act's "local distribution" proviso.

The reliability of House Report No. 709 and the soundness of the above conclusion are substantiated by the ruling in *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 92 S.Ct. 1827, 32 L.Ed.2d 369 (1972). In *Louisiana Power & Light*, the court addressed the "other sale" proviso of § 1(b). Based upon House Report No. 709, the court held the proviso "was meant to apply exclusively to *rate-setting*, and in no wise limited the broad base of 'transportation' jurisdiction granted the FPC." *Id.*, 406 U.S. at 640.

House Report No. 709 is a no less reliable indicator of congressional intent regarding the scope of the "local distribution" proviso. The proviso was viewed as mere "surplusage." Rather than diminishing the Commission's

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[3] The Court attaches, for purposes of identifying the transportation as "interstate" or "intrastate," no significance to the point at which the subject natural gas is transferred from high pressure transmission lines to low pressure lines. This distinction, drawn in *Federal Power Commission v. East Ohio Gas Co., supra*, is of questionable validity, cf. *Panhandle/Indiana, supra*, 322 U.S. at 513, and offers no instruction as to the meaning of "local distribution" in this case.

jurisdiction over interstate transportation and sales for resale in any substantive manner, it merely makes clear that "sales for resale" does not include direct retail sales for consumptive use "whether or not local in character." Thus, applying the § 1(b) "local distribution" proviso in conformance with congressional intent, the Court concludes it provides no basis for MPSC regulation of the proposed transaction.

The Court admits the contention that "local distribution" should be given a broader meaning out of respect for the states' authority to regulate matters of essentially local concern has facial appeal. Indeed, the instant proposed service *may* represent only the first of several similar arrangements for direct delivery of natural gas by Panhandle to other industrial end users in southeastern Michigan. If Panhandle were permitted to expand its direct service in this way, its operation could have a profound impact upon local gas supplies and rate structures.

In *Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981, 1035-37 (D.C. Cir. 1987) the court speculated in dictum that state agencies may have authority to regulate bypass transportation. The speculation is based upon the *Panhandle/Michigan* ruling that states retain authority under the Act to regulate direct *sales* to an industrial end user even though such sales are in interstate commerce. Yet, as indicated *supra*, careful reading of *Panhandle/Michigan* reveals it is based not upon a balancing of state and federal interests, but upon reference to the language of the Act. That is precisely the point. The courts are no longer free to engage in interest balancing to determine the relative parameters of federal and state jurisdiction. In fact, the § 1(b) bright line, "clear and complete," "easily ascertained," was specifically designed to obviate the need for such analysis. *Federal Power Commission v. Southern California Edison Co., supra.* The Court's task, then,

consistent with *Panhandle/Michigan*, is to apply the language employed in § 1(b) so as to effectuate congressional intent. This the Court has done.

The Court notes that if Panhandle were permitted to expand its direct service to other industrial end users in southeastern Michigan through various short extensions of interconnect facilities branching off from its interstate pipeline, its operation would begin to resemble the process of "distributing gas among consumers within a particular local community." *Federal Power Commission v. East Ohio Gas Co., supra*, 338 U.S. at 469-70. However, this *potential* sort of "local distribution" is not yet before the Court and, in any event, was clearly not within the contemplation of Congress in 1938 when § 1(b) was enacted. The Court must effectuate the intent of Congress which actually informed the language used in 1938, not the intent which the Court believes Congress might have had were it presented the facts and circumstances now before the Court. Moreover, the Court must construe § 1(b) exceptions to federal jurisdiction strictly. *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 691, 67 S.Ct. 1482, 91 L.Ed. 1742 (1946). Again, in concluding that no part of the proposed transaction constitutes local distribution, the Court believes it has been faithful to its task.

In summary, application of the § 1(b) bright line test of jurisdiction indicates the Act expressly confers upon the Commission authority to regulate the proposed interstate transportation of natural gas. The Act, on its face, provides no affirmative basis for regulation by the MPSC under either the "other sale" or "local distribution" provisos. The question remains whether the MPSC may exercise some residual authority not specifically mentioned in the Act or, on the other hand, whether such authority is preempted by the Commission's transportation jurisdiction under the Act.

PREEMPTION

It is contended that, prior to the Act, the states were recognized as having authority to regulate the sort of transportation and delivery of gas proposed here. Since the Act did not diminish the states' pre-existing authority, the MPSC is said to be entitled to exercise such authority under 1929 P.A. 69, even though the subject transportation does not involve a direct retail sale or local distribution.

It is unquestionably true that the states retain the regulatory authority they possessed before the Act came into being:

> The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by prior decisions.[13]

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[13] In H. Rep. No. 709, 75th Cong., 1st Sess., the Committee on Interstate and Foreign Commerce said of the proposed bill which became the Natural Gas Act: "It confers jurisdiction upon the Federal Power Commission over the transportation of natural gas in interstate commerce, and the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use. The States have, of course, for many years regulated sales of natural gas to consumers in intrastate transactions. The States have also been able to regulate sales to consumers even though such sales are in interstate commerce, such sales being considered local in character and in the absence of congressional prohibition subject to State regulation. (See Pennsylvania Gas Co. v. Public Service Commission (1920), 252 U.S. 23 [40 S. Ct. 279, 64 L.Ed. 434].) There is no intention in enacting the present legislation to disturb the States in their exercise of such jurisdiction. However, in the case of sales for resale, or so-called wholesale sales, in interstate commerce (for example, sales by producing companies to distributing companies) the legal situation is different. Such transactions have been considered to be not local in character

> The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.

Panhandle/Indiana, supra, 332 U.S. at 517-18. In this excerpt, the Supreme Court acknowledges that the states had the power, prior to the Act, (i.e., where Congress had not acted contrarily in exercise of its power under the Commerce), to regulate *sales* to consumers. This is the pre-existing state authority which the Act preserved by codifying the bright line, while conjunctively investing the Commission with power to regulate interstate transportation. There is no clear support for the proposition that the state ever had power to regulate direct delivery of gas in interstate commerce—in the absence of a sale. The courts simply were never faced with the sort of transportation arrangement proposed here. To opine that state regulation of Panhandle's proposed transportation would have been deemed an acceptable burden upon interstate commerce would be pure speculation. Such speculation is no longer necessary or appropriate, for Congress in the Act has enumerated not all parameters of state authority, but those forms of state regulation which are acceptable encumbrances upon interstate commerce: regulation of "other sales," "local distribution," and "production or gathering." The unavoidable implication is that other forms of state regulatory interference with interstate transportation are prohibited, for Congress has "occupied the field" by delegating its authority over interstate commerce to the Commission.

> and, even in the absence of Congressional action, not subject to State regulation. (See [State of] Missouri v. Kansas [Natural] Gas Co. (1924, 265 U.S. 298 [44 S.Ct. 544, 68 L.Ed. 1027], and Public Service Commission [of Rhode Island] v. Attleboro Steam and Electric Co. (1927) 273 U.S. 83 [47 S.Ct. 294, 71 L.Ed. 549].) The basic purpose of the present legislation is to occupy this field in which the Supreme Court has held that the States may not act."

This analysis forms the backdrop for determining whether the Act and the Commission's exercise of regulatory jurisdiction thereunder pre-empts the MPSC's asserted authority. The pre-emption doctrine finds its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2. Federal law is supreme and state law, to the extent it conflicts with federal law, is without effect. Application of the doctrine is a function of congressional intent. In *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, ——, 106 S.Ct. 1890, 90 L.Ed.2d 369, 381-82 (1986) the court summarized the circumstances under which Congress is deemed to have intended pre-emption as follows:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, Jones v. Rath Packing Co. 430 U.S. 519, 51 L.Ed.2d 604, 97 S.Ct. 1305 (1977), when there is outright or actual conflict between federal and state law, e.g., Free v. Bland, 369 U.S. 663, 8 L.Ed.2d 180, 82 S. Ct. 1089 (1962), where compliance with both federal and state law is in effect physically impossible, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 1082, 83 S. Ct. 1210 (1963), where there is implicit in federal law a barrier to state regulation, Shaw v. Delta Air Lines, Inc. 463 U.S. 85, 77 L.Ed.2d 490, 103 S. Ct. 2890 (1983), where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, Rice v. Santa Fe Elevator Corp. 331 U.S. 218, 91 L.Ed. 1447, 67 S. Ct. 1146 (1947), or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Hines v. Davidowitz, 312 U.S. 52, 85 L.Ed. 581, 61 S. Ct. 399 (1941). Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally

> delegated authority may preempt state regulation. Fidelity Federal Savings & Loan Assn. v. De La Cuesta, 458 U.S. 141, 73 L.Ed.2d 664, 102 S. Ct. 3014 (1982); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 81 L.Ed.2d 580, 104 S. Ct. 2694 (1984).

Several of the above examples are significant for present purposes.

First, there is a strong possibility of outright or actual conflict between federal and state law. Dual requirements of public convenience and necessity certification are not necessarily in conflict, but pose a great likelihood of conflict, since the MPSC would evaluate the same effects of the same proposed transportation from a somewhat different perspective than the Commission. The Supreme Court's recent ruling in *Schneidewind v. ANR Pipeline Co.*, 485 U.S. ——, 108 S.Ct. ——, 99 L.Ed.2d 316, 331-32 (1988) is instructive in this regard:

> When a state regulation "affect[s] the ability of [FERC] to regulate comprehensively . . . the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act" or prevents the "prospect of interference with the federal regulatory power," then the state law may be pre-empted even though "collision between the state and federal regulation may not be an inevitable consequence." Northern Natural Gas Co., 372 U.S. at 91-92, 9 L.Ed.2d 601, 83 S. Ct. 646.

The *Schneidewind* court went on to hold that although "hypothetical conflicts" will not always demonstrate intent to preempt, "imminent possibility" of conflict evidences complete occupation of a field, which justifies preemption. *Id.* Exercise of the MPSC's asserted authority to regulate aspects of interstate transportation over which the Commission has plenary authority and over

which the Commission has in fact exercised jurisdiction would certainly create imminent possibility of conflict.

This imminent possibility of conflict is not the only evidence of congressional intent to occupy the field. The very purpose of the Act was to provide for federal regulation of interstate transportation of natural gas, something the states had been unable to regulate. In this respect, Congress, which "has undoubted power to define the distribution of power over interstate commerce," occupied the field. *Panhandle/Indiana, supra*, 332 U.S. at 519, 521. Congress was "meticulous" in specifying those aspects of interstate commerce as to which state regulation would be permissible. However, the regulatory power here asserted by the MPSC does not pertain to any of those aspects; it is pure and simple a direct and impermissible burden on interstate transportation.

Furthermore, the asserted exercise of jurisdiction by the MPSC, if permitted, would certainly "stand as an obstacle to the accomplishment and execution of the full objectives of Congress." In the Act, Congress sought to establish a scheme of comprehensive, complementary and cooperative action between federal and state agencies. *Panhandle/Indiana, supra*, 332 U.S. at 520. To make exercise of the transportation authorized granted Panhandle by the Commission contingent upon MPSC certification would be to severely undermine the Commission in discharging its duty to regulate interstate transportation comprehensively and uniformly. To permit the MPSC to make its own determination of public convenience and necessity, potentially revoking the Commission's determination thereof would be to stultify the complementary, cooperative roles envisioned by Congress. This result must be avoided. Cf. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84, 83 S.Ct. 646, 9 L.Ed.2d 601 (1963); *First Iowa Hydro-Electric Cooperative v. Federal Power Commis-*

sion, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed 1143 (1946); *Public Service Commission of West Virginia v. Federal Power Commission*, 437 F.2d 1234, 1238-39 (4th Cir. 1971).

For the same reasons, the Court rejects the notion of concurrent jurisdiction. Even those cases cited in support of concurrent jurisdiction recognize it is inappropriate where state regulation would materially affect interstate commerce in an area; (1) where uniformity of regulation is necessary, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 444, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960), and (2) where state regulation would impair federal superintendence of the field, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Accordingly, the Court concludes enforcement of 1929 P.A. 69, M.C.L. § 460.501 *et seq.*, M.S.A. § 22.141 *et seq.* by the MPSC with respect to Panhandle's proposed bypass transportation is pre-empted by the Act The preliminary injunction issued by this Court must be set aside and Panhandle must be permitted to exercise the transportation authority granted it by the Commission.

CONCLUSION

The Court is not oblivious to the substantial local interests at stake. In holding the MPSC may not exercise the asserted regulatory authority to protect those interests, the Court has merely given effect to the regulatory scheme established by Congress in accordance with its intent. Pursuant to this scheme, it is for the Commission to evaluate and protect local interests, through its public convenience and necessity certification procedures, as it regulates interstate transportation on a comprehensive, nationwide basis. If these procedures are deemed to offer inadequate protection, then it is for Congress to fashion an appropriate remedy.

An order consistent with this opinion shall issue forthwith.

Dated: June 16, 1988

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

File No. L87-30-CA5

HON. ROBERT HOLMES BELL

NATIONAL STEEL CORPORATION and
PANHANDLE EASTERN PIPE LINE COMPANY,
Plaintiffs,

-vs-

WILLIAM E. LONG and EDWYNA G. ANDERSON,
Defendants.

File No. L87-46 CA5

HON. ROBERT HOLMES BELL

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan Corporation,
Plaintiff,

and

STATE OF MICHIGAN,
MICHIGAN PUBLIC SERVICE COMMISSION and
MICHIGAN GAS UTILITIES COMPANY,
Intervening Plaintiffs,

-vs-

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware Corporation,
Defendant,

and

NATIONAL STEEL CORPORATION,
Intervening Defendant.

JUDGMENT ORDER

In accordance with the Court's written opinion issued on June 16, 1988,

IT IS HEREBY ORDERED that the motions for summary judgment of National Steel Corporation and Panhandle Eastern Pipe Line Company are GRANTED;

IT IS FURTHER ORDERED that the motions for summary judgment of the Michigan Public Service Commission, William E. Long, Edwyna G. Anderson, Michigan Consolidated Gas Company, and Michigan Gas Utilities Company are DENIED;

IT IS FURTHER ORDERED that National Steel Corporation and Panhandle Eastern Pipe Line Company are awarded JUDGMENT in their favor, the asserted regulatory authority of the Michigan Public Service Commission having been pre-empted by federal law.

IT IS FURTHER ORDERED that the preliminary injunction issued by This Court on November 2, 1987 is dissolved.

Dated: June 16, 1988

/s/ Robert Holmes Bell
ROBERT HOLMES BELL
United States District Judge

STATUTORY PROVISIONS

NATURAL GAS ACT

Section 1, 15 U.S.C. § 717. Regulation of natural gas companies

(a) Necessity of regulation in public interest. As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) Transactions to which provisions of 15 USCS §§ 717 et seq. applicable. The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) Intra-state transactions exempt from provisions of 15 USCS §§ 717 et seq.; certification from state commission as conclusive exidence. The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the na-

tural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power of jurisdiction.

Section 7(c), 15 U.S.C. § 717f(c)(1)(A)

No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: Provided, however, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act.

Pending the determination of any such application, the continuance of such operation shall be lawful.

MICHIGAN ACT 69

MCL460.501 Definitions.

SEC. 1. The term "municipality", when used in this act, means a city, village or township.
when required.

The term "public utility", when used in this act, means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.

The term "commission", when used in this act, means the Michigan public utilities commission or such other state governmental agency as may exercise the powers now conferred upon said commission. (MCL § 460.501; CL '29, § 11087.)

MCL460.502 Certificate of convenience and necessity, when required.

SEC. 2. No public utility shall hereafter begin the construction or operation of any public utility plant or system thereof nor shall it render any service for the purpose of transacting or carrying on a local business either directly, or indirectly, by serving any other utility or agency so engaged in such local business, in any municipality in this state where any other utility or agency is then engaged in such local busines and rendering the same sort of service, or where such municipality is receiving service of the same sort, until such public utility shall first obtain from the commission a certificate that public convenience and necessity requires or will require such construction, operation, service, or extension. (MCL § 460.502; CL '29, § 11088.)